despite a myriad of meanings given by the Act to the word 'trafficking'.

I think I ought to say a few words about the recent Supreme Court case of *PP* v *Kau Joo Huat*,[11] in connection with my finding of accused No 1 having no power of disposal over the cannabis recovered.

That case is authority for saying that on a charge of possession under the Act, it is no longer necessary for the prosecution to prove the ingredient of power of disposal of an accused person over the drug found. This case has no doubt made the decisions hitherto on this particular point obsolete, such as the cases of *Toh Ah Loh & Anor* v *R*,[12] *Leow Nghee Lim* v *R*,[13] *Chan Pean Leon* v *PP*[14] and *PP* v *Ang Boon Foo*.[15]

I naturally followed the decision in this case by finding accused No 1 guilty of possession of the cannabis recovered by the police despite my finding also at the same time that she had no power of disposal over the drug. I would have had no hesitation in acquitting her altogether but for *Kau Joo Huat's case*.[11]

However, the finding of the absence of power of disposal, though it did not render the possession non-incriminating, was in my view, one of relevant factors, though, by no means conclusive standing by itself, for the court to consider if she had, on a balance of probabilities, rebutted the presumption of trafficking. Such presumption could be rebutted usually by surrounding circumstances. Since the court found no such power of disposal, accused No 1, more probably than not, had satisfied the court that prior to her arrest, she was not engaged in some of the activities within the definition of the word 'trafficking' in the Act, viz selling, supplying or distributing any of the said cannabis found in her room. I must add that the said absence of power of disposal was merely one of the findings, as it has been seen.

I therefore convicted her for the lesser offence of possession instead of trafficking under s 39B of the Act.

Order accordingly.

Solicitors: *Shaharuddin & Associates*; *Bachan & Kartar*; *Augustin Negrin & Co.*

Reported by *Ng Sheau Jiuan*

Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL APPLICATION NO CR 54-18-88
ANUAR J
28 OCTOBER 1988

Constitutional Law – Habeas corpus – Application for – Detention grounds referred to applicant's activities in practising and propagating Christianity – Article 11(1) of Federal Constitution guarantees freedom of religion – Whether detention grounds inconsistent with art 11 and outside purview of Internal Security Act 1960 – Federal Constitution, arts 11 & 149 – Internal Security Act 1960, s 8(1)

Preventive Detention – Detention grounds referred to applicant's activities in practising and propagating Christianity – Article 11(1) of Federal Constitution guarantees freedom of religion – Whether detention grounds inconsistent with art 11 and outside purview of Internal Security Act 1960 – Federal Constitution, arts 11 & 149 – Internal Security Act 1960, s 8(1)

This is an application by the applicant for an order that a writ of habeas corpus be issued to direct the respondents to produce the applicant before the court. The applicant was detained pursuant to an order made under s 8(1) of the Internal Security Act 1960 ('the Act') and the grounds stated in the order referred to the applicant's activities to practise and propagate Christianity.

The applicant contended that such activities were not prohibited under the law as under art 11(1) of the Federal Constitution a person was guaranteed freedom of religion. It was also contended that the Act, which is an Act enacted pursuant to art 149 of the Constitution, is inconsistent with art 11 and therefore not valid.

Held, allowing the application:

(1) Under art 149 of the Constitution, any provision in the Internal Security Act designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with any provision of arts 5, 9 or 10 of the Constitution. It is therefore clear that any provision in the Act which is inconsistent with the provision of art 11 of the Constitution shall not be valid.

(2) Although under s 8(1) of the Internal Security Act the Minister may detain a person with a view to preventing that person from 'acting in any manner' prejudicial to the security of Malaysia, the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under art 11 of the Constitution.

(3) It is obvious that the grounds as stated in the detention order are outside the scope of art 149 of the Constitution. Consequently, the order of detention upon the grounds inconsistent with art 11 of the Constitution is outside the purview of the Act and therefore not valid.

[*Editorial Note*: The respondents appealed to the Supreme Court vide Criminal Appeal No 76 of 1988. The Supreme Court (comprising Abdul Hamid LP, Hashim Yeop A Sani CJ (Malaya) and Ajaib Singh SCJ) dismissed the appeal on 24 February 1989. The written judgment of the court will be reported in the next issue.]

Case referred to

1 *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh* [1988] 3 MLJ 29 (refd)

Legislation referred to
Federal Constitution arts 5, 9, 10, 11, 149
Internal Security Act 1960 ss 8(1), 11(2)(b)

Mohd Raus Shariff (Deputy Public Prosecutor) for the first and second respondents.
Lee Min Choon for the applicant.

Cur Adv Vult

Anuar J: This is an application by the applicant for an order that a writ of habeas corpus be issued to direct the respondent to produce the applicant before this court and to show cause as to why the applicant should not be set at liberty forthwith on the grounds shown in the affidavit in support thereof.

The applicant was detained pursuant to an order made under s 8(1) of the Internal Security Act 1960. Pursuant to the requirement under s 11(2)(b) of the said Act the applicant was served with a statement of the grounds on which the order is made. The statement is in the following terms:

> *Alasan-alasan untuk perintah tahanan*
>
> Bahawa kamu, Jamaluddin bin Othman *alias* Yeshua Jamaluddin, sejak tahun 1985 hingga ditangkap pada 27hb Oktober, 1987, telah melibatkan diri dalam satu rancangan untuk menyebarkan agama Kristian di kalangan orang-orang Melayu. Kegiatan kamu itu boleh mendorong kepada timbulnya suasana ketegangan dan permusuhan di antara masyarakat Islam dengan masyarakat Kristian di negara ini dan boleh memudharatkan keselamatan negara.

It is settled law that it is open to the courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. In the case of *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh*,[1] Abdul Hamid Ag Lord President said in his judgment:

> With all due respect to the learned judge, he would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular he failed to recognize that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not ...

The grounds stated in the order clearly refer to the applicant's activities to practise and propagate Christianity. The applicant contended that such activities are not prohibited under the law. In fact under the Federal Constitution a person is guaranteed freedom of religion. Under cl (1) of art 11 of the Constitution a person has the right to profess and practise his own religion. State law may, however, control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. At the relevant time there was no such law prohibiting such propagation.

The applicant contended that the detention is bad in law in that it is inconsistent with the provision of art 11 of the Constitution.

It was contended that the Internal Security Act 1960, which is an Act enacted pursuant to art 149 of the Constitution, is therefore inconsistent with the provision of art 11 and not valid.

Under art 149 of the Constitution any provision in the Internal Security Act designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with any provision of art 5, 9 or 10 of the Constitution. It is therefore clear that any provision in the Internal Security Act which is inconsistent with the provision of art 11 of the Constitution shall not be valid.

The Minister has issued an order of detention under s 8(1) of the Internal Security Act. Section 8(1) reads as follows:

> If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

The power given to the Minister under this section is wide. However, it must be exercised within the scope provided under art 149 of the Constitution. Although under s 8(1) of the Internal Security Act the Minister may detain a person with a view to preventing that person from 'acting in any manner' prejudicial to the security of Malaysia, I am of the view that the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under art 11 of the Constitution. If the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of art 11 and therefore any order of detention would not be valid.

It was argued by the learned senior federal counsel on behalf of the respondents that the order of detention is necessary to prevent an act prejudicial to the security of the country. The Minister having been satisfied that the applicant's act is prejudicial to the security of the country, that decision, based on the subjective test, cannot be challenged in court. With respect I do not agree with his argument. The court is not challenging or questioning the facts of the case. The allegations of fact upon which the subjective satisfaction of the Minister is based are not open to challenge or judicial review. The court is looking

into the grounds of detention to consider whether they fall within the scope of the law which are open to challenge. It is obvious that the grounds as stated in the order are outside the scope of art 149 of the Constitution. Consequently the order of detention upon the grounds inconsistent with art 11 of the Constitution is outside the purview of the Internal Security Act and therefore not valid.

For the above reasons I would allow this application.

Application allowed.

Solicitors: *Lee Perara & Tan.*

Reported by *Ng Sheau Jiuan*

Chan Bee Yen v Yap Chee Kong

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-912-87
PEH SWEE CHIN J
10 OCTOBER 1988

Family Law – Custody of seven-year-old child – Paramount consideration is welfare of child – Rebuttable presumption that it is good for child to be with mother – Wishes of unimpeachable parent to prevail over those of the other parent – Conduct of the parties – Failure of husband to provide matrimonial home away from parents – Merits of case – Law Reform (Marriage and Divorce) Act 1976, s 88

In this custody case, the wife had earlier obtained an ex parte order granting her custody of her son aged seven years old. The husband applied to set aside the ex parte order, contending that the child had been very happy all along staying in the matrimonial home along with the child's grandparents and that the wife would not be able to provide the child with a proper house to live in. The husband also contended that the child had a blood abnormality which needed special care and attention.

Held, dismissing the husband's application:

(1) It is established law that the paramount consideration in a custody case is the welfare of the child, but this is not the sole consideration though it is predominant. Also, the wishes of an unimpeachable parent prevail over those of the other, subject to the said paramount consideration of welfare.

(2) Having regard to the age of the child, being under seven at the time of judgment, the rebuttable presumption mentioned in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 that it is for the good of the child to be with his mother would also fall for consideration.

(3) The court found that both the husband and wife loved the child but the mother did so more than the father. The husband appeared to have spent his spare time after his work not only in keeping the infant company, but also in indulging in his hobbies of cultivating Japanese miniature trees and rearing pet dogs. To the wife, her love for the infant now, since her separation from the husband and losing almost all that the marriage stood for, could have intensified and the child has now represented the only meaningful thing in life to her.

(4) As regards the change of residence on granting custody to the wife, it was not a matter of the mother being away from the infant for some time and had suddenly come in from the cold to claim him. The mother had been staying with the child till the father took the infant back from a school to which the wife had sent the infant. This situation was not as grave as 'uprooting' and any unhappy effects of such change of residence would be much more mercifully transient especially since the court later granted the husband daily access in respect of the infant.

(5) As for the wishes of the infant, the court did not conclude that the child's opinion of preferring to stay with his father was independent or reliable as the court's impression of the child being coached on what to say could not be at all ruled out.

(6) About the two homes, ie the more luxurious home of the paternal grandparents compared with the relative poverty of the maternal grandmother's home, this situation would be improved as the wife had booked a low-cost flat to which she would shift with the child and her mother.

(7) Regarding the blood abnormality which the infant was said to have, the mother could probably be affected similarly, and if this was so, other things being equal, the mother having had to take care of herself by avoiding those drugs over the years could have more experience and been more knowledgeable than any of her in-laws or the husband.

(8) As to the conduct of the parties, the husband was certainly aware of the desirability of providing a matrimonial home away from his parents and any failure to take such a step was conduct which was questionable, and the wife's complaint on this score was entirely justified. The complaint of the failure to provide a separate home for the wife had tipped the balance in favour of the wife when the court considered the question whether the wife was an unimpeachable parent in this case.

(9) After considering all the circumstances and the predominant factor of the child's welfare, the court granted custody to the mother with daily access to the father for certain hours.

[*Editorial Note*: The husband has appealed to the Supreme Court vide Civil Appeal No 220 of 1988.]

Cases referred to

1 *Manickam* v *Intherahnee* [1985] 1 MLJ 56 (refd)
2 *Thomasset* v *Thomasset* [1894] P 295 (refd)

Ronnie Teo for the plaintiff.
Lim Boon Seng for the defendant.

Cur Adv Vult

Peh Swee Chin J: I granted custody to the plaintiff, the mother of the infant born on 8 December 1981 (hereafter called 'the wife') and granted access to the defendant, the father, (hereafter called 'the husband'), everyday from 7 pm to 9 pm but the husband was ordered to pay costs which followed the event.

The order granted by me took the form of my dismissing an application by the husband to set aside an